UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KEYSTONE AUTOMOTIVE INDUSTRIES, INC.,	)	
Employer,	)	
and	)	Case 32-RC-137319
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 853,	)	
Petitioner.	)	

EMPLOYER'S ANSWERING BRIEF TO PETITIONER'S EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS

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ATTORNEYS FOR EMPLOYER

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I. INTRODUCTION

Pursuant to Section 102.69(f) of the Board's Rules and Regulations, the Employer Keystone Automotive Industries, Inc. (Keystone or the Employer or the Company), by and through the undersigned counsel, submits this answering brief to Petitioner International Brotherhood of Teamsters, Local 853's (the Union) exceptions to the hearing officer's Report and Recommendations on Objections (Report) issued on September 3, 2015.

II. ARGUMENT

The Union excepts to the hearing officer's recommendation that the Board overrule Objection 8 concerning the Employer's use of ride-alongs during the critical period. The Union specifically asks the Board to overrule *Frito Lay, Inc.*, 341 NLRB 515 (2004), and establish a "bright-line rule that ride-alongs during the critical period are inherently coercive and objectionable." (U. Br. 3.) In the alternative, the Union asks the Board to reject the hearing officer's finding that the Employer's ride-alongs were not objectionable based on the *Frito Lay* factors. The Union's exceptions should be rejected.

A. The Board Should Reject the Union's Invitation to Overrule Well-Established Precedent.

Relying on *Noah's New York Bagels*, 324 NLRB 266 (1997), the Board in *Frito Lay* expressly held that "[t]he use of ride-alongs to communicate with over-the-road truckdrivers is not, in itself, coercive." *Frito Lay*, 341 NLRB at 516. The Board explained: "The trucks are employer property and the drivers' main worksite. An employer may choose to campaign by accompanying employees on their routes if it prefers not to interfere with its truckdrivers' work schedules or to require the employees to remain after work for meetings." Id. Thus, the Board held, "[a]n employer's use of ride-alongs to communicate with its employees during an election

campaign is only objectionable if, under all the circumstances, the use of ride-alongs interferes with the employees' right to freely choose a bargaining representative." Id.

The *Frito Lay* Board explicitly rejected the notion, raised by Member Wilma Liebman in a concurring opinion, that it "revisit *Noah's New York Bagels* and consider whether there should be a bright line rule prohibiting all employer ride-alongs for campaign purposes during the critical period." Id. at 517. According to the Board, "there is no suggestion that the principles of that case have given rise to confusion or have been difficult to administer." Id. Moreover, the Board observed, "the multifactor approach of *Noah's New York Bagels* represents a careful balance between employee rights and managerial prerogatives." Id.

The principles that guided the *Frito Lay* Board to refuse to apply a bright-line rule forbidding all campaign ride-alongs have not changed. The relevant factors the Board considers, as discussed more fully below, are straightforward and easy to apply. More importantly, they are essential to ensuring a proper balance between potentially conflicting rights.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the United States Supreme Court held that employer free speech rights under Section 8(c) and employee free association rights under Section 7 are equal and must be balanced when both rights are implicated. A blanket prohibition on employers engaging in ride-alongs during a union organizing campaign would impermissibly elevate Section 7 rights over Section 8(c) rights. And given the Board's recent adoption of rules designed to expedite the election process, it is more important than ever that employers' free speech rights during the critical period before an election not be inhibited.

The Union relies heavily on Liebman's concurring opinion in *Frito Lay* to frame its arguments. However, Liebman's discussion is premised on generalities and speculation. According to Liebman, a ride-along "places drivers in very close confinement with a superior,

sometimes for very long periods" and "drivers have no real option except to listen to their supervisor's message." Id. at 518. Liebman prognosticates: "[A]n ordinary driver, knowing full well the purpose of the ride-along, will feel pressure to engage in election-related conversation with the supervisor. Human beings are social creatures, and it would be socially awkward, at best, to sit in stony silence during the ride." Id. Based on these concerns, Liebman urged the Board to "take a closer look" at the issue.

Even if Liebman's fears hold true in some ride-along situations, they certainly are not true in all situations. For that reason alone, a bright-line rule makes no sense here. Under a bright-line approach, campaign ride-alongs would be prohibited even when they are 10 minutes long, and even when the employer has an established practice of conducting ride-alongs prior to union activity. A per se rule against campaign ride-alongs would also effectively prohibit ride-alongs for legitimate business purposes, such as evaluating driver performance or ensuring safety along the route. This is because "the arrangement itself" is what Liebman views as putting "inappropriate pressure on individual employees," rather than "what word actually passed between managers and drivers and how much of the drive actually was spent in election-related conversations." Id.

The Union's argument that ride-alongs are similar to home visits, which have long been prohibited, is equally unpersuasive.[1] In the simplest terms, the cab of a truck is not a home. The Board's authority to regulate an employer's conduct with respect to its own property is much more constrained than its authority to regulate an employer's conduct with respect to the property of its employees. See *Holyoke Water Power Co.*, 273 NLRB 1369, 1370 (1985) ("[W]e are constrained to balance the employer's property rights against the employees' right to proper representation.").

[1]Notably, Liebman did not advance this argument in her concurrence in *Frito Lay*.

Further, one of the principal reasons employer home visits are prohibited, but union home visits are not, is that employers have the right to access employees during working time on employer property, whereas unions typically do not. Thus, a per se rule prohibiting employer home visits serves to "level the playing field" during a campaign. See *Plant City Welding & Tank Co.*, 119 NLRB 131, 133-134 (1957) ("Unlike employers, unions often do not have the opportunity to address employees in assembled or informal groups . . . ."). No such policy concerns exist with respect to ride-alongs.

Finally, the Union's failure to challenge the Employer's use of ride-alongs until *after* losing the election also seriously undermines its position. If the Union truly believed that Board law should be changed to reflect a per se rule prohibiting campaign ride-alongs, it could have file an unfair labor practice charge when the campaign ride-alongs began in September 14. Instead, it waited until it lost the election to raise the issue.

In short, campaign ride-alongs are not inherently coercive, and the Board's multifactor approach to analyzing whether a particular ride-along is unlawful or objectionable appropriately balances employee Section 7 rights and employer free speech and property rights. Consequently, the Board should not dismiss the Union's request that it overrule well-established precedent.[2]

B. The Board Should Reject the Union's Argument that the Ride-Alongs were Coercive under *Frito Lay*.

The Union argues that, even if the Board declines to adopt a bright-line rule prohibiting campaign ride-alongs, it should nevertheless reject the hearing officer's conclusion that the Employer's ride-alongs were not coercive under the *Frito Lay* analysis. Contrary to the Union's

[2]If the Board were inclined to accept the Union's exception and reconsider whether a bright-line rule prohibiting campaign ride-alongs is appropriate, the Board should invite the parties and interested amici an opportunity to further brief the issue, as it does with respect to other significant changes to existing law it proposes to make. Moreover, if the Board does ultimately adopt a bright-line rule, it should not apply the rule retroactively, because doing so would result in manifest injustice to the Employer, who clearly relied on existing Board law to justify the campaign ride-alongs.

argument, the hearing officer's findings and recommendations are amply supported by the record and should be affirmed.

To determine whether the use of "ride-alongs" is objectionable conduct, the *Frito Lay* Board outlined the following factors to consider: (1) whether the use and conduct of ride-alongs is reasonably tailored to meet the employer's need to communicate with employees in light of the availability and effectiveness of alternate means of communication; (2) the atmosphere prevalent during the "ride-alongs" and the tenor of conversations between drivers and employer representatives; (3) whether the employer effectively permitted employees to decline ride-alongs; (4) the frequency of ride-alongs, both during and prior to the campaign; (5) the positions held by ride-along guests; (6) whether the ride-alongs were scheduled in a discriminatory manner; and (7) whether the ride-alongs took place in a context otherwise free of objectionable conduct. *Frito Lay*, 341 NLRB at 517 (citing *Noah's New York Bagels*, 324 NLRB at 275; *Emery Worldwide*, 309 NLRB 185, 186-187 (1992); *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984), affd. *Hotel Employees & Restaurant Employees, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985)).

The Union argues the hearing officer did not analyze each of the above factors, and instead simply determined that the facts of the case were very similar to those in *Frito Lay*. While the hearing officer did observe that the facts were very similar to those in *Frito Lay*, she definitively applied the facts to the *Frito Lay* legal framework. Among other things, the hearing officer found that the Employer had a legitimate desire to communicate with employees "information relevant to the drivers' upcoming voting decision," but its ability to do so at the facility "was constrained because the drivers spent most of their time on the road." (Report 26). Thus, she effectively considered whether the Employer's use and conduct of ride-alongs was reasonably tailored to meet

the Employer's need to communicate with employees in light of the availability and effectiveness of alternative means of communication.

The hearing officer also found that when drivers objected to having ride-alongs, their requests were honored without being questioned (Report 27). The hearing officer even noted that at least one employee, Gordon Quarry, "abruptly ended all discussions about the union organizing as soon as the Employer initiated those discussions during their ride-alongs with him" (Report 28). The hearing officer's findings are directly supported by witness testimony (Tr. 976, 1070, 1517), including Quarry's own testimony: "I actually stopped a couple of them and told them that I didn't want to talk about it" (Tr. 420).

The hearing officer further found that the Employer sent supervisors and non-supervisors[3] along the routes, the ride-alongs were scheduled based on the route schedule and availability, and all of those participating were trained on how to lawfully communicate with employees (Report 27). Her findings in this regard was supported by credited testimony from multiple witnesses (Tr. 973, 978, 1084, 1146-1147, 1517).

Of all the evidence presented about the ride-alongs, the hearing officer found only one instance of alleged coercive conduct—the alleged interrogation of employee Faumuina (Report 27). Based on this isolated finding—to which the Employer filed its own exceptions—the hearing officer implicitly concluded that the overall atmosphere and tenor of conversations between the drivers and the managers did not warrant a finding that *all* the ride-alongs were coercive under the *Frito Lay* framework.

[3]Contrary to the Union's contention, the hearing officer's finding that non-supervisors also participated in the ride-alongs was supported by the record. Quarry testified that a driver named "Debo" rode along with him (Tr. 419), and employee Tolopa-Joe Faumuina testified that a third-party consultant, Oliver Bell, rode with him (Tr. 322-323).

The Union next argues that the hearing officer erred in finding the employer had no effective alternative means of communication, but that is not what *Frito Lay* says is required to legitimize campaign ride-alongs. *Frito Lay* merely instructs the hearing officer to *consider* the availability and effectiveness of alternative means of communication. The hearing officer did consider the issue, and she squarely found that "the drivers spent most of their time on the road." (Report 26.)

Additionally, the Union argues there is substantial evidence in the record that the ride-alongs were scheduled in a discriminatory manner. There is no merit to this argument. The only testimony in the record to the effect that pro-Union supporters received more ride-alongs than pro-Company supporters was pure conjecture from employee Faumuina. Faumuina generally testified that he was subject to the most ride-alongs of anyone. He claims he counted the number of ride-alongs other employees were subject to, and he believes there was a difference between the number of ride-alongs that pro-Union employees were subject to and the number that pro-Company employees were subject to. (Tr. 320-321.) This is far from "substantial evidence," and the hearing officer reasonably refused to find that it proved discrimination on the part of the Employer with respect to ride-along assignments.

In sum, the hearing officer's findings and conclusions with respect to the Union's objection to the Employer's use of ride-alongs during the campaign are supported by the record and are rationale and consistent with the Act.

III. CONCLUSION

For the reasons stated herein, the Board should reject the Union's exceptions to the hearing officer's findings and recommendations.

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2015, I e-filed the foregoing **EMPLOYER'S ANSWERING BRIEF TO PETITIONER'S EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS** using the Board's e-filing system and that it was served on counsel for the Union via email on October 1, 2015, at pmcentee@beesontayer.com, and that it was served on the Regional Director, Region 32 on October 1, 2015, via email at george.velastegui@nlrb.gov.

/s/ Reyburn W. Lominack, III